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U.S. Citizenship  
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Services

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JAN 28 2005

FILE: SRC 02 039 50226 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner:

Beneficiary

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed the nonimmigrant petition seeking to extend the employment of its president as a nonimmigrant intracompany transferee pursuant to § 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of Georgia that is operating a restaurant. The petitioner claims that it is the subsidiary of the beneficiary's foreign employer, located in Hyderabad, India. The petitioner now seeks to extend the beneficiary's stay for an additional three years.

The director denied the petition determining that the petitioner did not demonstrate that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Specifically, the director concluded "it is questionable that with such a small staff the beneficiary is not called upon to perform many duties associated with running a business that are not managerial or executive."

On appeal, counsel claims that the beneficiary's job duties in the United States organization "are clearly executive in nature." Counsel explains that "the Regulations contemplate that for start-up businesses the petitioner must merely establish that it is making normal progress in the growth and development of the business," and states that the petitioner has demonstrated through documentary evidence that it continues to be a financially viable entity. Counsel also cites *Mars Jewelers, Inc. v. INS*, 702 F. Supp. 1570, 6 Immig. Rptr. A3-62 (N.D. Ga. 1988), in which the Court determined that Citizenship and Immigration Service's (CIS) interpretation of the statute and regulations defining managerial capacity and executive capacity was too restrictive on small companies. Counsel claims that *Mars Jewelers* is controlling precedent in the present matter. Counsel submits a brief and additional documentary evidence on appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a management or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The issue in the present matter is whether the beneficiary would be employed by the United States entity under the extended petition in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- (i) Manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial

capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- (i) Directs the management of the organization or a major component or function of the organization;
- (ii) Establishes the goals and policies of the organization, component, or function;
- (iii) Exercises wide latitude in discretionary decision-making; and
- (iv) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner filed the nonimmigrant petition on November 9, 2001, noting that the beneficiary would be employed under the extended petition as president. In an appended letter, dated October 9, 2001, the petitioner stated that the beneficiary has been responsible for overseeing the start-up and development of the United States subsidiary and for managing its day-to-day operations. The petitioner noted that in his position of president, the beneficiary performs the following job duties: marketing, finance, business development, including researching and negotiating business ventures, and hiring and supervising the petitioner's personnel. In an attached statement highlighting the beneficiary's professional experience, the beneficiary documented his responsibility for supervising the development and implementation of the petitioner's marketing strategies, such as advertising campaigns and promotions, and supervising the company's financial and administrative operations. The petitioner also submitted its employee report for the period of January 2001 through September 2001, which identified five workers, including the beneficiary, employed by the petitioning organization.

In a request for evidence dated January 9, 2002, the director asked that the petitioner submit a statement describing the beneficiary's employment in a primarily managerial or executive capacity and addressing the following: (1) the beneficiary's job duties and position title; (2) the percentage of time the beneficiary spends on each task; (3) the subordinate managers, supervisors, or employees who report to the beneficiary; (4) the job duties performed by the beneficiary's subordinate employees; (5) the employees who are responsible for providing the petitioner's services or producing the petitioner's products; and (6) the petitioner's personnel levels. The director also asked that the petitioner explain its hours of operation and submit the work schedule of its employees.

Counsel responded in a letter dated March 19, 2002, and provided the following description of the beneficiary's position as president/chief executive officer:

*The duties performed by the beneficiary are executive. As a top executive, [the beneficiary] is tasked with exploring the overall investment climate of the U.S. market. His time is devoted to negotiating investments, establishing diversified business interests and overseeing*

the staff he has selected to actually perform the daily operations. There is sufficient staff to perform the daily duties of the restaurant for which he is overall responsible for the continued success of the business.

(Emphasis in original). Counsel further stated that the beneficiary would continue to direct the management of the company, would establish the petitioner's goals and policies, and would exercise complete control over the company's investment decisions and business plans. Counsel explained that, other than the beneficiary, the petitioner currently staffs the following four employees, who perform the daily operations of the restaurant: two cooks, one cashier, and one part-time cleaner. Counsel stated that the beneficiary is responsible for the hiring and firing of personnel and overseeing the staff's payroll. Counsel further explained that the cooks are responsible for maintaining the inventory.

Counsel explains that the petitioner's five-year plan includes opening an additional store in the Atlanta metro area, thereby requiring a larger personnel structure. Counsel stated that the beneficiary would therefore be responsible for overseeing a larger operation as the petitioning organization grows.

In an appended business plan, the petitioner noted that its present organizational structure included the beneficiary, who is in charge of running the restaurant's operations and "key personnel" at each existing or proposed restaurant. The petitioner explained that its future organizational structure would include a director of store operations, which "will provide a supervisory level between the executive level and the store management level." The petitioner further noted that it also anticipates employing a full-time accountant.

In a decision dated July 31, 2002, the director determined that the petitioner had failed to demonstrate that the beneficiary would be employed by the United States organization in a primarily managerial or executive capacity. The director noted that in an organization such as the petitioner's, which employs a limited number of workers, it becomes questionable whether the beneficiary is employed in a primarily qualifying capacity. The director concluded that with the petitioner's limited staff of five employees the beneficiary would likely be required to perform many non-managerial and non-executive duties associated with running the business. The director further noted that the beneficiary's "actual time devoted to these functions would exceed that which is spent in purely managerial or executive duties for the company." Accordingly, the director denied the petition.

In an appeal filed on September 3, 2002, counsel states that the record demonstrates that the beneficiary is employed as an executive and a manager, and claims that the petitioner's limited staff does not make the beneficiary any less of a manager or an executive. In a brief submitted on appeal, counsel outlines the following "executive" duties performed by the beneficiary: (1) directing the daily operations of the business, including marketing, administration, finance, and business development; (2) researching the acquisition of new businesses; (3) exercising wide latitude in discretionary decision-making; and (4) determining the hiring and firing of the petitioner's personnel, which counsel notes presently includes nine workers.

Counsel cites *Mars Jewelers, Inc. v. INS*, and states that controlling precedent dictates that the present petition should be approved. Counsel notes that in response to the decision in *Mars Jewelers*, in which the Court held that CIS' denial of the nonimmigrant petition erroneously emphasized the size of the petitioning organization and its number of employees, the statutes defining managerial capacity and executive capacity were amended to broaden the application of the L classification. Counsel claims that the beneficiary in *Mars Jewelers*, who

was the president and chief executive officer of a small retail jewelry store, "had the same duties and responsibilities as the beneficiary in the instant case."

Counsel further states that the petitioning organization is "financially sound," thereby demonstrating the petitioner is a viable entity. Counsel claims that when CIS grants an L-1 visa to an executive or manager of a start-up company, the petitioner must demonstrate that it is making progress in establishing its business and expanding operations in order to extend the nonimmigrant petition. Counsel submits documentary evidence, including the petitioner's 2002 corporate tax return, employer's quarterly federal tax returns for 2002 and the first quarter of 2003, invoices, utility bills, insurance statements, bank statements and advertisements as evidence of the business' growth. Counsel contends that "[t]he evidence clearly shows that the Beneficiary has been and continues to serve and perform duties consistent with [CIS'] definitions of 'Executive or Manager'."

On review, the petitioner has not demonstrated the beneficiary's employment by the United States entity in a primarily managerial or executive capacity.

As correctly noted by counsel on appeal, when a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. In order to qualify for an extension of L-1 nonimmigrant classification under a petition involving a new office, the petitioner must demonstrate through evidence, such as a description of both the beneficiary's job duties and the staffing of the organization, that the beneficiary will be employed in a primarily managerial or executive capacity. What counsel fails to recognize is that there is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). As required in the regulations, the petitioner must submit a detailed description of the executive or managerial services to be performed by the beneficiary. *Id.* The record in the present matter is lacking an ample description of the tasks to be performed by the beneficiary as the petitioner's president. Although the director requested a detailed description of the beneficiary's job duties, including an allocation of the percentage of time spent on each task, counsel provided a vague outline of the beneficiary's responsibilities, including "exploring the overall investment climate of the U.S. market," "negotiating instruments, establishing diversified business interests and overseeing the staff he has selected." Counsel description fails to expand on the limited job description previously provided by the petitioner with the nonimmigrant petition. Additionally, counsel neglected to document the percentage of time the beneficiary would spend on each task. The regulation at 8 C.F.R. § 214.2(l)(3)(viii) states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. A petitioner's failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Moreover, on appeal, counsel merely restates the regulation defining executive capacity as evidence that the beneficiary is performing job duties similar to those of an executive. See § 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

Furthermore, the beneficiary is not supervising the work of managerial, supervisory, or professional employees or directing the management of the organization as required in the statutory definitions of managerial and executive capacity. See §§ 101(a)(44)(A) and (B). Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. Here, the petitioner has not established that the beneficiary's subordinate employees, including two cooks, a cashier and a cleaner, possess or require an advanced degree, such that they could be classified as professionals. Nor has the petitioner shown that any of the employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act, or that the beneficiary is directing the "management" of the company as required in section 101(a)(44)(B)(i) of the Act.

Also, the petitioner's future staffing levels and the proposed employment capacity of each worker are irrelevant to the analysis of the beneficiary's managerial or executive capacity. The petitioner stated in its business plan that it anticipates expanding its business and employing a director of store operations and an accountant. Counsel also claims on appeal that the petitioner presently employs nine employees, as compared to the five workers employed at the time of filing the petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). As the petitioning organization has been operating for one year and is required to support the beneficiary in a managerial or executive capacity at the time of filing the petition, the petitioner's proposed staffing levels will not be considered.

Lastly, counsel's claim that the Court's finding in *Mars Jewelers, Inc.* is "controlling precedent" for the instant matter is not supported by the record. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the *Mars Jewelers* matter. Counsel merely claims that the beneficiary in *Mars Jewelers* "had the same duties and responsibilities as the beneficiary in the instant case" and that both organizations employ a limited number of workers. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Based on the foregoing discussion, the AAO cannot conclude that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. For this reason, the appeal will be denied.

Beyond the decision of the director, an additional issue is whether the beneficiary's foreign employer and the petitioning organization possess a qualifying relationship as required in § 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). The regulations and case law confirm that the key factors for establishing a qualifying relationship between the U.S. and foreign entities are ownership and control. *Matter of Siemens Medical Systems, Inc.* 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); *see also Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988) (in immigrant visa proceedings). In the context of this visa petition, ownership refers to the direct and indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

Here, the petitioner noted on the nonimmigrant petition that it is the subsidiary of the beneficiary's foreign employer. However, the record, including the petitioner's corporate tax returns and business plan, demonstrates otherwise. Schedules E and K and Statement 6 of the petitioner's 2002 corporate tax return identify the beneficiary as the sole shareholder of the petitioner's common stock. Additionally, the petitioner's business plan indicates that "[the beneficiary] is the principal owner [of the petitioning organization]." The documentary evidence is clearly inconsistent with the petitioner's claim of a parent-subsidary relationship. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). For this additional reason, the appeal will be dismissed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

**ORDER:** The appeal is dismissed.